JD(ATL)–69–03
Houston, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

GB TECH, INC.

and **CASE 16–CA–22799**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

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BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on September 8 and 9, 2003 in Houston, Texas. After the parties rested, I heard oral argument, and on September 11, 2003, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law and Order provisions are set forth Below.

[1] The bench decision appears in uncorrected form at pages 431 through 444 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

Further Discussion Concerning Animus

In the attached bench decision, I concluded that the General Counsel had failed to establish, by a preponderance of the evidence, the fourth element required under the framework established by the Board in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). This element consists of evidence establishing a connection between an employee's protected activities and the adverse employment action suffered by the employee. Conveniently but somewhat imprecisely, this fourth *Wright Line* element can be called the requirement of establishing "animus."

In some cases, the General Counsel proves animus through evidence that a respondent has committed other unfair labor practices, such as making threats or other statements which violate Section 8(a)(1) of the Act. However, in this case, the government does not allege that any of Respondent's supervisors or agents made any unlawful statement. Moreover, the General Counsel does not attribute to any of Respondent's supervisors or agents any other statement which, although not unlawful, would nonetheless reveal a link between the protected activities of the two alleged discriminatees and the adverse employment actions they experienced.

Instead, the General Counsel argues that Respondent treated the two alleged discriminatees, Rhonda Robinson and Eddie Menefee, more harshly than it had treated other employees in similar situations and that such disparate treatment constitutes sufficient evidence of animus.

Under well–established Board precedents, evidence of a "blatant disparity" in treatment is sufficient, by itself, to satisfy the fourth *Wright Line* element. ***New Otani Hotel & Garden***, 325 NLRB 928, fn. 2 (1998), citing ***Fluor Daniel, Inc.***, 304 NLRB 970, 970–971 (1991). For example, in ***Tubular Corporation of America***, 337 NLRB No. 13 December 20, 2001), the Board stated:

> Here, the judge found no direct evidence of union animus, but inferred an unlawful motive based on a variety of circumstances. These circumstances included the suspicious timing and disparate nature of Knott's discipline, the unprecedented scope of the Respondent's investigation of Knott, the absence of a cogent reason for conducting such an investigation, the failure to afford Knott any opportunity to answer the allegations raised by the investigation and, last, the fact that the Respondent's behavior was inconsistent with its progressive discipline system and its past practice.

337 NLRB No. 13, slip op. at 1. From such circumstances, the Board held, a discriminatory motive properly could be inferred.

In the present case, I concluded that the evidence failed to establish that the discharge of Eddie Menefee constituted disparate treatment. In reaching that conclusion, I noted that the government had not established that Respondent had treated any other leadman less severely for similar conduct. Even were I to disregard Menefee's status as a leadman, I would not conclude that his discharge was *blatantly* disparate to discipline imposed on other employees.

Respondent conducted a thorough investigation before imposing discipline on Menefee and Robinson, but the record does not establish that such an investigation was "unprecedented in scope," as in the ***Tubular Corporation of America*** case. Respondent clearly gave both Menefee and Robinson opportunity to answer the allegations. Thus, the facts in ***Tubular Corporation of America*** clearly are distinguishable.

CONCLUSIONS OF LAW

1. The Respondent, GB Tech, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Complaint is dismissed.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. Because I conclude that the government has not established all elements necessary under the Board's *Wright Line* framework, I recommend that the Complaint be dismissed.

Procedural History

This case began on May 15, 2003, when the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, which I will call the "Union" or the "Charging Party," filed its initial charge in this proceeding. On July 30, 2003, after investigation of the charge, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government. Respondent filed a timely Answer.

On September 8, 2003, hearing opened before me in Houston, Texas. On September 8 and 9, 2003, the parties presented evidence. Also on September 9, 2003, counsel presented oral argument. Today, September 11, 2003, I am issuing this bench decision.

Undisputed Allegations

Based on admissions in Respondent's Answer, I find that the government has proven the allegations raised in Complaint paragraphs 1, 2, 3, 4, and 6. More specifically, I find that the Union filed and served the unfair labor practice charge as alleged in Complaint paragraph 1.

Further, I find that Respondent is a Texas corporation with an office and place of business in Houston, Texas, and that at all material times it was engaged in the logistics business. More specifically, based on uncontradicted testimony, I find that Respondent operates a warehouse which holds materials and supplies used by United States Alliance, a NASA contractor.

Based on the admissions in Respondent's Answer, I also find that Respondent meets the appropriate discretionary standard for the Board's exercise of jurisdiction and that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Moreover, based on the admissions in Respondent's Answer, I find that at all material times, Project Manager Stan Simmons, Supervisor Jimmy Turner, and Human Resources Manager Amber Williams have been supervisors and agents of Respondent within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

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Respondent's Answer does not admit that the Union is a labor organization within the meaning of Section 2(5). General Counsel's Exhibits 54 and 55 establish that on February 21, 2003, the Union filed a petition to represent a unit of Respondent's employees and received a majority of the votes cast in an election conducted by the Board on March 28, 2003. Based on this evidence and taking notice of other Board decisions involving this same Union, I find that it is a labor organization within the meaning of Section 2(5) of the Act.

Complaint paragraph 7 alleges that Respondent issued a letter of warning to employee Rhonda Robinson on about April 10, 2003. Respondent's Answer admits issuing this warning but states that it did so on April 17, 2003. That date is consistent with the evidence in this case. I find that Respondent issued a written warning to Robinson on April 17, 2003.

Complaint paragraph 8 alleges that Respondent discharged its employee Eddie Menefee on about April 10, 2003. Respondent's Answer admits that it discharged Menefee, but states that it did so on April 16, 2003. The record includes a letter informing Menefee that he was discharged "effective immediately" and this letter is dated April 16, 2003. In accordance with this evidence, I find that Respondent discharged Menefee on April 16, 2003.

Complaint paragraph 10 alleges that by issuing the warning to Robinson and by discharging Menefee, Respondent violated Section 8(a)(3) and (1) of the Act. Respondent denies these allegations, which will be addressed later in this decision.

Credibility Resolutions

To a considerable extent, witnesses for the General Counsel and for Respondent gave conflicting testimony about the events in this case. Before describing the events leading to the discipline of Robinson and the discharge of Menefee, I must determine which testimony about these events should be trusted.

Based upon the witnesses' demeanor as they testified, I do not credit the testimony of Rhonda Robinson and Eddie Menefee. Indeed, after observing the witnesses, I formed a strong impression that the testimony of Robinson and Menefee was not reliable.

Moreover, Ms. Robinson's responses struck me as being too often evasive. Additionally, her own description of her behavior on April 10, 2003 is starkly at odds with other accounts of how she acted.

Both Cleta Zapota, a neutral witness having no interest in the outcome of this proceeding, and Respondent's employee Ed Johnson testified, in effect, that Ms. Robinson hindered Johnson's attempt to deliver sheet metal to the location desired by Ms. Zapota. In Ms. Robinson's own account, she did nothing to prevent Johnson from completing the delivery of the sheet metal. In light of the credible and consistent testimony given by Zapata and Johnson, Robinson's version is simply not believable.

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On the other hand, I conclude that Zapata's testimony is reliable for two reasons. First, her demeanor while testifying indicated that her account was as accurate as memory allowed. Second, because she was not employed by Respondent and presumably not involved in the Union organizing campaign, she had no stake in this proceeding and no reason to slant her testimony one way or the other.

Although Respondent's project manager Stan Simmons and Supervisor Jimmy Turner are associated with Respondent, based on their demeanor as witnesses I have considerable confidence in their testimony. For the same reason, I credit the testimony of Respondent's human resources manager, Amber Williams.

Employees Frankie Washington and Rosemary Smith gave testimony that tends to contradict that of Turner concerning management's instructions to Menefee and Robinson concerning delivery of a particular order of sheet metal on April 10, 2003. Based on my observations of the witnesses, I do not credit Washington and Smith to the extent their testimony conflicts with that of Turner and Simmons.

Unfair Labor Practice Allegations

Respondent's principal customer, United States Alliance (which I will call "USA") provides services to the National Aeronautics and Space Administration (or "NASA") in connection with operation of the NASA's space shuttle program. Respondent, in turn, is a subcontractor to USA. Among other things, Respondent operates a warehouse which stores sheet metal and other materials which the USA machinists and fabricators need, from time to time, in their work.

The warehouse operated by Respondent and the machine and fabrication shops operated by USA share the same building. When USA fabricators need material, a USA representative notifies Respondent, which then generates the necessary paperwork to document the transfer. One of Respondent's employees then brings the paperwork to an office area adjoining the USA machine shop. A USA representative working at a desk in this office area signs the paperwork and, customarily, Respondent's employee would return with it to the warehouse and one of Respondent's warehouse employees would then retrieve the materials from storage.

In the past, when the material requested was sheet metal, USA employees usually went to the warehouse, picked up the sheet metal, and returned with it to the shop. However, USA changed that procedure after the Union won a representation election among Respondent's warehouse employees.

Specifically, the Union filed a representation petition, in Case 16–RC–10490, seeking to represent a unit of Respondent's employees. On March 28, 2003, Board agents conducted an election. A majority of voters selected the Union.

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After the Union won the representation election, USA officials told Respondent that USA employees no longer would enter the warehouse area to pick up materials. Rather, the Respondent's employees would have to bring the materials to USA's shop. Respondent told USA that it would comply with the new procedure.

The Complaint in this case does not allege that USA and Respondent have any business relationship which would make USA's conduct imputable to Respondent. The Complaint also does not allege that this change in procedure constitutes an unlawful unilateral change violating Section 8(a)(5) of the Act. Indeed, the Complaint alleges no Section 8(a)(5) violation of any type.

Moreover, the Complaint does not allege that Respondent's assignment of the additional delivery work to its employees discriminated against them in retaliation for their selection of the Union to represent them. Therefore, I will assume that USA lawfully changed its procedure and that Respondent lawfully assigned its employees to do the additional delivery work necessitated by the change.

On April 10, 2003, USA requested that Respondent provide sheet metal from the warehouse. Respondent's employee Rhonda Robinson took the necessary paperwork to the administrative area adjacent to the USA shop and gave it to the USA representative, Cleta Zapota, for signature. Robinson made a comment to Zapata indicating that she expected USA employees to come to the warehouse to pick up the sheet metal. Zapata, knowing that USA had changed its procedure, decided that she should check with USA management before dispatching anyone. Therefore, she told Robinson that she would keep the paperwork

At this point, Zapata credibly testified, Robinson appeared to become agitated and said something to the effect that "you all [were] doing this union business out of hand."

Robinson returned to the warehouse visibly upset. She discussed the matter with the lead employee, Eddie Menefee. Robinson and Menefee had been the two Union observers at the March 28, 2003 election.

Menefee took the matter to Respondent's management. Project manager Stan Simmons met with Menefee and Robinson. Simmons credibly testified that he told Robinson that she should not be upset and that they should "work with the customer."

Menefee said he was just going to deliver the load of sheet metal to Cleta Zapota. Simmons countermanded him, saying, "You need to deliver this material to where the material needs to go."

When warehouse employee Ed Johnson took the cart of sheet metal to the USA shop, Robinson went with him. In view of all the evidence, I conclude that she did so to prevent Johnson from delivering the sheet metal to the shop area itself, rather than leaving it at the desk of Cleta Zapota.

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When Johnson and Robinson came in to Zapata's office area with the cart of sheet metal, Zapata walked over to the door of the machine shop and stated "this way." Zapata credibly testified that Robinson replied "No, it said fab shop and we're putting it in the fab shop." Zapata further testified:

> And I had my back turned to her and I turned around and I said "what?" She said "It said fab shop and we're putting it in the fab shop." And Ed was still pushing cause he knew it had to go in there and she just, you know, she was holding it and she said "fab, right here." And it was her tone, she was kind of agitated and so I told her "okay." And so she just left it sitting right there, the big cart with the big piece of sheet metal.

Johnson and Robinson left the sheet metal on the cart near the door of Zapata's boss's office and then left.

The incident generated a formal protest to Respondent from USA. In fact, a USA official informed Respondent that this matter would show up on Respondent's annual performance evaluation.

Respondent's management conducted an extensive investigation, interviewing and taking statements from all the persons directly involved. Then, management decided to issue a written warning to Robinson and to discharge Menefee. It issued no discipline to Johnson because he had tried to make the delivery and later apologized to Zapata.

Respondent stated that it discharged Menefee because, in his capacity as leadman, he directed Robinson to disregard management's order that the materials be delivered where the customer needed them, and not left with Zapata. Respondent considered this conduct to be insubordination.

The General Counsel contends that Respondent disciplined Robinson and Menefee because they had been the Union's observers in the March 28, 2003 election. In evaluating this matter, I will follow the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

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Clearly, the General Counsel has established the first three *Wright Line* elements. Both Menefee and Robinson engaged in union activities, including advocating the Union to fellow workers and serving as the Union's observers. Clearly, their service as Union observers was apparent to management and thus Respondent was aware of at least some of their Union activities. Additionally, a written warning and a discharge certainly are adverse employment actions.

The government must also establish a link between the protected activities and the adverse employment action. In the typical case, statements by management officials establish this link. The Complaint alleges no such violative statements and the record does not establish any.

The General Counsel argues that Respondent treated Menefee more harshly than it disciplined other employees for the offense of insubordination and that the disparate treatment constituted evidence of antiunion animus. However, the record does not disclose that any other employee had engaged in the same type of conduct as Menefee.

Specifically, Menefee used his authority as a lead to direct other employees not to follow Respondent's policy. Such misuse of authority can carry greater potential for harm than a 'rank–and–file' employee's refusal to obey a particular instruction. The Respondent's records do not document any other instance in which a lead received discipline for telling other workers to disobey orders, so I cannot conclude that Respondent treated Menefee differently than it would have treated some other lead in similar circumstances.

Respondent's witnesses credibly testified that they took into account Menefee's status as a lead and held him to a higher standard because of this status. No evidence contradicts this assertion and no evidence indicates that Respondent adopted a higher standard for leads because Menefee or any other lead engaged in union activities. In view of Respondent's legitimate business reasons for holding leads to a higher standard, and in the absence of any evidence suggesting a discriminatory motive for adopting this standard, no unlawful intent may be inferred from Respondent's application of this standard.

The General Counsel also argues that Respondent demonstrated animus by treating employee Robinson differently than it treated employee Johnson, even though both were involved in the same incident. However, although the two employees were in the same place, they did not engage in the same conduct. Johnson tried to deliver the sheet metal in compliance with the customer's request but Robinson stopped him. Thus, Johnson did nothing to interfere with satisfying Respondent's customer.

Disparate treatment arises from treating two similar situations differently, but the conduct of Johnson and Robinson was not similar.

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The General Counsel also contends that Respondent could merely have stripped Menefee of his status as a lead rather than discharge him. This argument does not rest on disparate treatment but on the severity of treatment. It is not for me to second–guess an employer's disciplinary policy, but only to make sure that it has not been applied to discriminate against those who engaged in protected activities.

In all the circumstances, I conclude that the government has not proven the fourth *Wright Line* element. Therefore, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, all representatives demonstrative the highest level of civility and professionalism, which I note and appreciate. The hearing is closed.

B E N C H D E C I S I O N

Time noted: 1:00 p.m.

JUDGE LOCKE: This decision is issued pursuant to Section 102.35(a)(1) and Section 1-2.45 of the Board's Rules and Regulations.

Because I conclude that the Government has not established all evidence necessary under the Board's Wright Line decision, I recommend that the Board dismiss this complaint.

Procedural history. This case began on May 15, 2003, when the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, which I will call the union, or the Charging Party, filed its initial charge in this proceeding.

On July 30, 2003, after investigation of the charge, the regional director for Region 16 of the National Labor Relations Board issued a complaint and notice of hearing, which I will call the complaint.

In issuing this complaint, the regional director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel, or as the Government. Respondent filed a timely answer.

On September 8, 2003, hearing opened before me in Houston, Texas. On September 8 and 9, 2003, the parties presented evidence. Also on September 9, 2003, counsel presented oral argument. Today, September 11, 2003, I am issuing this bench

decision.

Undisputed allegations. Based on admissions and Respondent's answer, I find that the Government has proven the allegations in complaint paragraphs 1, 2, 3, 4 and six. More specifically, I find that the union filed and served the unfair labor practice charge as alleged in complaint paragraph 1.

I find that Respondent is a Texas corporation with an office and place of business in Houston, Texas, and at all material times it was engaged in the logistics, business. More specifically, based on uncontradicted testimony, I find that Respondent operates a warehouse which holds materials and supplies used by United Space Alliance, a NASA contractor.

Based on the admissions in Respondent's answer, I also find that Respondent meets the appropriate discretionary standard for the board's exercise of jurisdiction, and that at all material times that it's been an employee engaged in commerce within the meaning of Section 226 and seven of the Act.

Moreover, based on the admissions in Respondent's answer, I find that at all material times, Project Manager Stan Simmons, Supervisor Jimmy Turner, and Human Resources Manager have been supervisors and agents of Respondent within the meaning of Sections 211 and 213 of the Act, respectively.

Respondent's answer does not admit that the union as a labor organization was in the meaning of Section 2.5. In General Counsel's Exhibits 54 and 55 establish that on February

21, 2003, the union filed a petition to represent a unit of Respondent's employees and received a majority of the votes cast in an election conducted by the board on March 28, 2003.

Based on this evidence, and taking notice of other board decisions involving this same union, I find that it is a labor organization within the meaning of Section 2.5 of the Act.

Complaint paragraph 7 alleges that Respondent issued a letter of warning to employee Rhonda Robinson on about April 10, 2003. Respondent's answer admits issuing this warning, but states that it did so on April 17, 2003. That date is consistent with the evidence in this case.

I find that Respondent issued a written warning to Robinson on April 17, 2003.

Complaint paragraph 8 alleges that Respondent discharged its employee, Eddie Menefee, on about April 10, 2003. Respondent's answer admits that it discharged Menefee, but states that it did so on April 16, 2003. The record indicates that a letter informing Menefee that it would -- he was discharged, effective immediately, and this letter is dated April 16, 2003.

In accordance with this evidence, I find that Respondent discharged Menefee on April 16, 2003.

Complaint paragraph 10 alleges that by issuing the warning to Robinson, and by discharging Menefee, Respondent violated Section 8(a)(3) and (1) of the Act. Respondent denies these

allegations, which will be addressed later in this decision.

Credibility resolutions. To a considerable extent, witnesses for the General Counsel and for Respondent gave conflicting testimony about the events in this case. Before describing the events leading to the discipline of Robinson and the discharge of Menefee, I must determine which testimony about these events should be trusted.

Based upon the witnesses' demeanor as they testified, I do not credit the testimony of Rhonda Robinson and Eddie Menefee. Indeed, after observing the witnesses, I formed a strong impression that the testimony of Robinson and Menefee was not reliable.

Moreover, Ms. Robinson's responses struck me as being too often evasive. Additionally, her own description of her behavior on April 9 -- April 10, 2003 is starkly at odds with other accounts of how she acted.

Both Cleta Zapata, a neutral witness having no interest in the outcome of this proceeding, and Respondent's employee, Ed Johnson, testified in effect that Ms. Robinson hindered Johnson's attempt to deliver sheet metal to the location desired by Ms. Zapata.

In Ms. Robinson's own account, she did nothing to prevent Johnson from completing the delivery of the sheet metal. In light of the credible and consistent testimony given by Zapata and Johnson, Robinson's version is simply not believable.

On the other hand, I conclude that Zapata's testimony is reliable for two reasons. First, her demeanor while testifying indicated that her account was as accurate as memory allowed. Second, because she was not employed by Respondent, and presumably, not involved in the union organizing campaign, she had no stake in this proceeding and no reason to slant her testimony one way or the other.

Although Respondent's project manager, Stan Simmons, and supervisor Jimmy Turner are associated with Respondent, based upon their demeanor as witnesses, I have considerable confidence in their testimony. For the same reason, I credit the testimony of Respondent's Human Resources Manager, Amber Williams.

Employees Frankie Washington and Rosemary Smith gave testimony that tends to contradict that of Turner concerning management's instructions to Menefee and Robinson concerning delivery of a particular order of sheet metal on April 10, 2003.

Based upon my observations of the witnesses, I do not credit Washington and Smith to the extent their testimony conflicts with that of Turner and Simmons.

Unfair labor practice allegations. Respondent's principal customer, United Space Alliance, which I will call USA, provides services to the National Aeronautics and Space Administration, or NASA, in connection with operation of the NASA's Space Shuttle Program.

Respondent, in turn, is a subcontractor to USA. Among

other things, Respondent operates a warehouse which stores sheet metal and other materials which the USA machinists and fabricators need from time to time in their work.

The warehouse operated by Respondent and the machine and fabrication shops operated by USA share the same building. When USA fabricators need material, a USA representative notifies Respondent, which then generates the necessary paperwork to document the transfer.

One of Respondent's employees then brings the paperwork to an office area adjoining the USA machine shop. A USA representative working at a desk in this office area signs the paperwork, and customarily, Respondent's employee would return with it to the warehouse, and one of Respondent's warehouse employees would then retrieve the materials from storage.

In the past, when the material requested, or sheet metal, USA employees usually went to the warehouse, picked up the sheet metal, and returned with it to the shop.

However, USA changed that procedure after the union won a representation election among Respondent's warehouse employees. Specifically, the union filed a representation petition, in Case 16-RC-10490, seeking to represent the unit of Respondent's employees.

On March 28, 2003, board agents conducted an election. A majority of the voters elected the union. After the union won the representation election, USA officials told Respondent that

USA employees no longer would enter the warehouse area to pick up materials.

Rather, the Respondent's employees would have to bring the materials to USA's shop. Respondent told USA that it would comply with the new procedure. The complaint in this case does not allege that USA and Respondent have any business relationship which would make USA's conduct imputable to Respondent. The complaint also does not allege that this change in procedure constitutes an unlawful unilateral change violating Section 8(a)(5) of the Act. Indeed, the complaint alleges no Section 8(a)(5) violation of any type.

Moreover, the complaint does not allege that Respondent's assignment of the additional delivery work to its employees discriminated against them in retaliation for their selection of the union to represent them. Therefore, I will assume that USA lawfully changed its procedure, and that Respondent lawfully assigned its employees to do the additional delivery work necessitated by the change.

On April 10, 2003, USA requested that Respondent provide sheet metal from the warehouse. Respondent's employee, Rhonda Robinson, told the -- took the necessary paperwork to the administrative area adjacent to the USA shop, and gave it to the USA representative, Cleta Zapata for signature.

Robinson made a comment to Zapata indicating that she expected USA employees to come to the warehouse to pick up the

sheet metal. And Zapata, knowing the USA had changed its procedure, decided that she should check with management before dispatching anyone. Therefore, she told Robinson that she would keep the paperwork.

At this point, Zapata credibly testified Robinson appeared to become agitated and said something to the effect that, quote, "You all were doing this union business out of hand." End quote.

Robinson returned to the warehouse visibly upset. She discussed the matter with the lead employee, Eddie Menefee. Robinson and Menefee had been the two union observers at the March 28, 2003 election.

Menefee took the matter to management. Project Manager Stan Simmons met with Menefee and Robinson. Simmons credibly testified that he told Robinson that she should not be upset, and they should, quote, "Work with the customer." End quote.

Menefee said that he was just going to deliver the load of sheet metal to Cleta Zapata. Simmons countermanded him, saying, quote, "You need to deliver this material to where the material needs to go." End quote.

When warehouse employee Ed Johnson took the cart of sheet metal to the USA shop, Robinson went with him. In view of all the evidence, I conclude that she did so to prevent Johnson from delivering the sheet metal to the shop area itself, rather than leaving it at the desk of Cleta Zapata.

When Johnson and Robinson came into Zapata's office area with a cart of sheet metal, Zapata walked to the door of the machine shop and stated, This way. Zapata credibly testified that Robinson replied, quote, "No, it said fab shop, and we're putting it in the fab shop." End quote.

Then Zapata further testified, quote, "And I had my back turned to her, and I turned around and I said, What? She said, quote, It said fab shop, and we're putting it in the fab shop." End quote.

"And Ed was still pushing, because he knew it had to go in there. And she just, you know, she was holding it, and she said, Fab. Right here. And it was her tone. She was kind of agitated. And so I told her, Okay. And so she just left it sitting right there, the big cart with the big piece of sheet metal." End quote.

Johnson and Robinson left the sheet metal on the cart near the door of Zapata's boss's office and then left. The incident generated a formal protest to Respondent from USA. In fact, a USA official informed Respondent that this matter would show up on Respondent's annual performance evaluation.

Respondent's management conducted an extensive investigation, interviewing and taking statements from all the persons directly involved. Then management decided to issue a written warning to Robinson and to discharge Menefee.

It issued no discipline to Johnson, because he had tried

to make the deliver, and later apologized to Zapata. Robinson [sic] stated that they discharged Menefee because, in his capacity as lead man, he directed Robinson to disregard management's order that the materials be delivered where the customer needed them, and not left with Zapata. Respondent considered this conduct to be insubordination.

The General Counsel contends that Respondent discharged Robinson and Menefee because they had been the union's observers in the March 28, 2003 election. In evaluating this matter, I will follow the framework established by the board in Wright Line, 251 NLRB 1083, 1980, and 4662 Fed. 2nd, 899, First Circuit 1981, Cert denied 455 U.S. 989, 1982.

Under Wright Line, the General Counsel must establish four elements by a preponderance of the evidence. First, the Government must show the existence of activity protected by the Act. Second, the Government must prove that Respondent was aware that the employees had engaged in such activity.

Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the Government must establish a link or nexus between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place, even in the

absence of protected activity, Wright Line, 251 NLRB, 1083 at 1089.

See also Mannon Electric, Inc., 321 NLRB 278, 280 at footnote 12, 1996.

Clearly, the General Counsel has established the first three Wright Line elements. Both Menefee and Robinson engaged in union activity, including advocating the union to fellow workers and serving as the union's observers.

Fairly their service as union observers was apparent to many, and thus Respondent was aware of at least some of those union activities. Additionally, a written warning and a discharge certainly are adverse employment actions.

The Government must also establish a link between the protected activities and the adverse employment action. In a typical case, statements by management officials establish this link. The complaint alleges no such violative statements, and the record does not establish any.

The General Counsel argues that Respondent treated Menefee more harshly than it disciplined other employees for the offense of insubordination, and that the disparate treatment constituted evidence of anti-union animus.

However, the record does not disclose that any other employee had engaged in the same type of conduct as Menefee. Specifically, Menefee used his authority as a lead man to direct other employees not to follow Respondent's policy. Such misuse

of authority can create greater potential for harm than a rank-and-file employee's refusal to obey a particular instruction.

The Respondent's records do not document any other instance in which a lead received discipline for telling other workers to disobey orders. So I cannot conclude that Respondent treated Menefee differently than it would have treated some other lead in similar circumstances.

Respondent's witnesses credibly testified that they took into account Menefee's status as the lead, and held him to a higher standard because of his status.

No evidence contradicts this assertion, and no evidence indicates that Respondent adopted a higher standard for leads because Menefee or any other lead engaged in union activities.

In view of Respondent's legitimate business reasons for holding leads to a higher standard, and in the absence of any evidence suggesting a discriminatory motive for adopting this standard, no unlawful intent may be inferred from Respondent's application of the standard.

The General Counsel also argues that Respondent demonstrated animus by treating employee Robinson differently than it treated employee Johnson, even though both were involved in the same incident. However, although the two employees were in the same place, they did not engage in the same conduct.

Johnson tried to deliver the sheet metal in compliance with the customer's request, but Robinson stopped him. Mr.

Johnson did nothing to interfere with satisfying Respondent's customer.

Disparate treatment arises from treating two similar situations differently. But the conduct of Johnson and Robinson was not similar.

The General Counsel also contends that Respondent could merely have stripped Menefee of his status as a lead, rather than discharge him. This argument does not rest on disparate treatment, but on the severity of treatment.

It is not for me to second-guess an employer's disciplinary policy, but only to make sure that it has not been applied to discriminate against those who engaged in protected activities.

In all of the circumstances, I conclude that the Government has not proven the fourth Wright Line element. Therefore, I recommend that the board dismiss the complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision.

This certification also will include provisions relating to the findings of fact, conclusions of law and order. When that certification is served upon the party, the time period for filing an appeal will begin to run.

Throughout this proceeding, all representatives

demonstrated the highest levels of civility and professionalism, which I note and appreciate. The hearing is closed. Thank you all very much.

(Whereupon, at 1:25 p.m., the hearing was concluded.)

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C E R T I F I C A T E

This is to certify that the attached proceedings before

the NATIONAL LABOR RELATIONS BOARD, Region 16

IN THE MATTER OF:

GB TECH, INC.

and

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

CASE NUMBER: 16-CA-22799

PLACE: Houston, Texas

DATE: September 11, 2003

were held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the reporting or recording accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

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